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FEDERAL COMMUNICATIONS COMMISSION  
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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

In the Matter of )  
 )  
Implementation of Section 309(j) )  
of the Communications Act ) PP Docket No. 93-253  
 )  
Competitive Bidding )

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Comments of the Chief Counsel for Advocacy  
of the United States Small Business Administration  
on the Further Notice of Proposed Rulemaking

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I. Introduction

In 1993, Congress enacted the Omnibus Budget Reconciliation Act (OBRA) which, among other things, sought to reduce the deficit by changing the method in which the federal government issues licenses for use of the electromagnetic spectrum. Prior to 1993, the Federal Communications Commission (FCC or Commission) issued licenses either through comparative hearings to determine the licensee best suited for using the license or through lotteries. Congress modified this procedure by authorizing the FCC to issue licenses through auctions of spectrum in which the highest bidder would obtain the license. Congress further required that spectrum in the 2 GHz band be auctioned with all deliberate speed. Congress also mandated that the auction rules to be developed by the FCC also provide opportunities for small businesses, minority and women-owned

businesses and rural telephone companies to obtain licenses (hereinafter collectively referred to as designated entities).

Shortly after the passage of OBRA, the Commission issued a report and order specifying the licensing requirements for personal communication services (PCS)<sup>1</sup> in the 2 GHz band. The FCC then instituted a rulemaking to develop regulations to implement the auction provisions of OBRA. After the submission of comments in the auction proceeding, the FCC decided to revisit its report and order on licensing requirements for PCS. During this reconsideration process, the Commission reported an initial order outlining generic rules for auctions. Subsequent to the adoption of generic auction rules, the Commission revised its licensing requirements for PCS. The FCC then announced rules to govern the auction for PCS that varied dramatically from the generic auction rules. In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding,

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<sup>1</sup> PCS is a more advanced form of cellular telephony. Cellular telephony uses radio waves to transmit a voice conversation from one receiving antenna (called a cell site) to another. As a user of a mobile device travels, a computer switches the communication from one cell to the next. Cell sites in cellular telephony are miles apart and require reasonably powerful transmitters to reach the antenna within a given cell. PCS adapts these principles but dramatically increases the number of cells (cell sites might be as close as a 100 yards apart). The proximity of cell sites reduces the power needed to reach a receptor antenna and significantly reduces the size of the transmitter to slightly smaller than palm size in first generation PCS technology. As digital technological advances are made, the size of the transmitters are likely to be reduced even further until they reach the size of the medallion communication devices on Star Trek: The Next Generation.

PP Docket No. 93-253, Fifth Report and Order, reprinted in 59 Fed. Reg. 37,566 (July 22, 1994) (hereinafter Fifth Report and Order).

The main thrust of the auction rules for PCS was the development of entrepreneurial block which limited bidding on two blocks of spectrum to firms with gross revenue of less than \$125 million dollars. *Id.* at 37,586. Designated entities that qualify for participation in the entrepreneurial block<sup>2</sup> were given added incentives, including installment payments and bidding credits. *Id.* at 37,588-92.

One special type of assistance was provided solely for rural telephone companies. The Commission authorized rural telephone companies to obtain PCS licenses for areas that are geographically partitioned from larger PCS service areas.<sup>3</sup> This plan would benefit rural communities because the telephone companies could provide PCS to their customers without having to serve larger territories in which they have no presence. *Id.* at 37,592-93.

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<sup>2</sup> Some women-owned firms, such as the Washington Post Company and Cox Enterprises, are designated entities but their revenues exceed those for bidding in the entrepreneurial block.

<sup>3</sup> The FCC has divided the country into 51 major trading areas (MTAs) and 492 basic trading areas (BTAs). A MTA may include multiple BTAs. For example, the MTA in Southern California extends from San Diego northward to Santa Barbara and eastward to Las Vegas. Within that one MTA are approximately a half-dozen BTAs usually coinciding with metropolitan regions and their suburbs.

## II. *The Further Notice of Proposed Rulemaking*

The FCC, in response to various petitions for reconsideration has instituted this rulemaking to determine whether a partitioning scheme should be made available to women and minority-owned businesses. In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Further Notice of Proposed Rulemaking, *reprinted in* 59 Fed. Reg. 41,426 (August 12, 1994). The Commission requested comments on two specific points:

1) whether allowing minority and women-owned firms to partition licenses would serve the public interest; and 2) what mechanisms should be used to partition licenses including whether any restrictions should be imposed on partitioning.

The Office of Advocacy concurs with those petitions for reconsideration that support partitioning for women and minority-owned firms. However, the Office of Advocacy also supports extending the partitioning to small businesses that are not owned by women or minorities.

## III. *Public Interest Benefits of Partitioning*

One of the major concerns expressed by Congress, both in OBRA and subsequent hearings, is the potential that the price of spectrum for PCS will be so prohibitive that designated entities

will be foreclosed from the market. Those fears were exacerbated by the recent auction of ten nationwide licenses for advanced paging service in which no license was won by a designated entity.

Despite the admirable efforts made by the Commission in developing auction rules to assist designated entities, an undercurrent of uncertainty still flows through the designated entity community. They still remain concerned that the costs for purchasing a BTA license and constructing the system, even in the entrepreneurial block, will prohibit them from successfully bidding for a PCS license. Partitioning the size of the area that designated entities would have to construct and operate systems would make their likelihood of success far greater.<sup>4</sup> Therefore, the Office of Advocacy strongly endorses the use of partitioning.

The Office of Advocacy believes that the Commission's proposal for partitioning does not go far enough. Under the FCC's proposal, all designated entities except small businesses are eligible for partitioning. The Office of Advocacy believes that small businesses, as defined in the Commission's Fifth Report and Order, 59 Fed. Reg. at 35,596-97, should also be

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<sup>4</sup> The Office of Advocacy historically has taken the approach that smaller licensing areas are better for designated entities than larger areas. Partitioning may accomplish the objective of smaller territories without repeating the expensive territorial consolidation of the cellular telephone industry.

afforded the opportunity to undertake partitioning. This would give small telecommunications firms with already established infrastructures, such as cellular and cable operators, the opportunity to provide a wider array of telecommunication services without expending resources to provide PCS in unfamiliar territories. Expanding the partitioning option to all small businesses would ensure the most rapid deployment of PCS, especially in potentially underserved rural and inner city areas. This would further a particularly important goal of OBRA -- the rapid deployment of new wireless technologies throughout the United States. Thus, the Office of Advocacy opines that giving all designated entities the opportunity to partition would be in the public interest.

#### *IV. The Mechanisms for Partitioning Licenses*

Before addressing the specific procedures for partitioning license areas, a threshold issue must be resolved -- which designated entities may partition. The Office of Advocacy believes that only firms eligible for bidding in the entrepreneurial block should be permitted to partition.<sup>5</sup> This would include all small businesses and women or minority-owned

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<sup>5</sup> That does not mean that the firm must limit its bid to the spectrum assigned to the entrepreneurial block. Hypothetically, a designated entity eligible for bidding in the entrepreneurial block could also bid on other spectrum blocks or decide to bid on blocks solely outside the entrepreneurial block. Assuming that the firm won the bid, be it for the entrepreneurial block or some other block, the firm would be eligible to partition.

businesses with gross revenue of less than \$125 million dollars. Designated entities with revenues in excess of the entrepreneurial block limit do not need the type of assistance resulting from partitioning and these firms should not be eligible.

In the Fifth Report and Order, the Commission authorized rural telephone companies to partition licensing areas in one of two ways. Rural telephone companies may form bidding consortia consisting entirely of rural telephone companies to participate in auctions and then partition the licenses won among consortia participants. In the alternative, rural telephone companies may acquire partitioned PCS licenses from other licensees through private negotiation and agreement either prior or subsequent to the auction. *Id.* at 37,592, ¶ 151. The second alternative is limited, in general, to partitions no greater than twice the size of the rural telephone company's wireline franchise territory.

The Office of Advocacy supports extending partitions by consortium to all designated entities eligible for bidding in the entrepreneurial block. Partitioning of a consortium's winning bid permits designated entities to build and manage a reasonable-sized system without going through the layers of decisionmaking associated with a consortium.



The Office of Advocacy finds that the second alternative, partitioning through pre- auction or post-auction agreement, is more problematic. In particular, the Office of Advocacy believes that this type of partitioning may increase the probability of speculation and trafficking in licenses.<sup>6</sup> For example, a designated entity may win a BTA license and then decide that it can only construct a small portion of the PCS system. It then turns and sells the rest of the BTA license area to a non-designated entity. All other designated entities then have lost the opportunity to build and manage a system for that BTA. Similarly, the winning designated entity may receive a windfall for the resale of the license. This type of trafficking may be beneficial to the winning bidder but does little to provide the most opportunity for designated entities to participate in PCS.

The Office of Advocacy has two recommendations for ensuring that unwarranted speculation and trafficking does not occur due to partitioning of license areas by designated entities. First, the sale of partitioned areas should be made to other designated

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<sup>6</sup> Most rural telephone companies are regulated by state public utility commissions and the FCC. Any actions, such as speculation in spectrum auctions, that might harm service to wireline customers would be subject to regulatory oversight. Activities, such as bidding for spectrum, would be premised on providing additional services to existing customers and not on the chance that the rural telephone company would obtain a windfall through speculation.

entities if they make reasonable offers.<sup>7</sup> Second, any designated entity that partitions a license must meet accelerated milestones for construction and operation of a PCS system.<sup>8</sup> The failure to meet these milestones will result in the forfeiture of the license and the payment of penalties, including any profit in excess of the designated entity's original bid amount.<sup>9</sup> If these modifications are imposed on license partition by negotiated sale, then the Office of Advocacy would support this type of partitioning. Without these changes, partitioning would not serve the public interest or satisfy the OBRA requirement of ensuring that designated entities be given the opportunity to obtain a PCS license.

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<sup>7</sup> Winning bidders could ask the Commission for an exception to this if, after a six month period, the licensee received no reasonable offers from any other designated entities. A reasonable bid would be one in which the offer was equivalent to the percentage value of the designated entity's winning bid for that portion of the license. For example, if the designated entity seeking to partition the license paid \$1 million and the partitioning entity sought to pay \$250,000 for 25% of the population in the license area, then the offer would be considered reasonable.

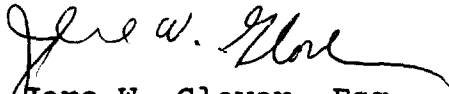
<sup>8</sup> The Office of Advocacy does not believe this represents an undue burden on designated entities. These entities will be flush with new capital from the partition sales while the size of the system will be significantly smaller. Given these factors, partitioning entities must be held to tighter time frames for construction and operation. Exceptions to these tighter milestones may be given but only for extraordinary circumstances beyond the control of the designated entity.

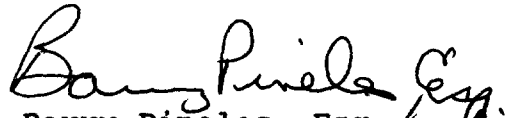
<sup>9</sup> It is quite conceivable that the winning bidder would receive more for the partitioned areas than the bidder paid for the license. These excess profits would have to be returned along with the license if the milestones are not met.

## V. Conclusion

The Office of Advocacy endorses the extension of partitioning to all designated entities eligible for participation in the entrepreneurial block. Partitioning will further enhance participation by designated entities in the provision of PCS. While the Office of Advocacy supports partitioning, the Commission must be concerned about potential exploitation of partitioning by speculators and traffickers. Strong penalties and milestone requirements should eliminate traffickers from bidding and then reselling licenses under a partition plan.

Respectfully submitted,

  
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